



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL OPINION NO. 86-10

TO: W. R. Schroeder
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

You have asked us to respond to several questions. These questions present three legal issues:

- (1) May a board of county commissioners establish a mandatory countywide personnel system affecting deputies and assistants of other county officers?
- (2) May a board of county commissioners create offices other than those specifically authorized by statutes or the constitution?
- (3) May a board of county commissioners hire its own employees?

CONCLUSIONS:

(1) County commissioners may not directly control the work activities of deputies and assistants of other officers, nor may they establish mandatory grievance or termination procedures for other offices. County commissioners set the salaries of other officers and their deputies and assistants. The power to set salaries entails some power to mandate a personnel system.

(2) New offices may not be created by county commissioners.

(3) County commissioners have implied authority to directly employ persons needed to carry out their duties.

ANALYSIS:

I.

AUTHORITY OF COUNTY COMMISSIONERS

Previously this office issued a guideline dated December 12, 1979, discussing the issues raised in your letter. 1979 Attorney General's Opinions at 248. That guideline is adopted with some expansion and modifications as the opinion of this office.

County offices are established by art. XVIII, § 6, Idaho Const., which states, in pertinent part:

The legislature by general and uniform laws shall, commencing with the general election in 1970, provide for the election biennially, in each of the several counties of the state, of county commissioners and a coroner, and for the election of a sheriff and a county assessor and, a county treasurer, who is ex officio public administrator, every four (4) years in each of the several counties of the state. . . . The clerk of the district court shall be ex officio auditor and recorder No other county offices shall be established. . . . The county commissioners may employ counsel when necessary. The sheriff, county assessor, county treasurer, and ex officio tax collector, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistants as the businesses of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners.

Thus, there are six county offices: commissioner, coroner, sheriff, assessor, treasurer, and clerk of the district court. Of these, the sheriff, assessor, treasurer, and clerk may appoint deputies and assistants as authorized by the county commissioners.

The text of art. XVIII, § 6, neither allows nor forbids commissioners to regulate deputies of other officers. Further, there is no Idaho law directly addressing the commissioners' power

to establish a mandatory countywide personnel system. There is, however, a substantial body of Idaho authority defining the general contours of commissioners' power under art. XVIII, § 6, and delineating specific powers under that section. From these authorities one can draw conclusions about particular types of countywide personnel ordinances.

As a general principle, the various county offices should be viewed as being independent of one another. The Idaho Supreme Court has held that the commissioners may not assume the duties of other offices. Meller v. Board of Commissioners, 4 Idaho 44, 35 P. 712 (1894); Clark v. Ada County Board of Commissioners, 98 Idaho 749, 754, 572 P.2d 501, 506 (1977); Gorman v. Board of Commissioners, 1 Idaho 553 (1874). The Gorman court stressed the fact that each officer is an elected official in his or her own right. From these cases, one can conclude that the commissioners are not above the other county officers. It follows that any mandatory countywide personnel system enacted by the commissioners and imposed on other county officers is suspect.

Because the commissioners may not assume the duties or judge the job performance of other county officers, direct supervision of these officers, deputies and assistants by the commissioners is almost certainly forbidden. Also, Gorman can easily be extended to prevent commissioners from judging the job performance of deputies of other officers. Thus, any mandatory personnel system that would allow the commissioners to control the discipline, suspension, or firing for cause of deputies and assistants of other officers would almost certainly be forbidden.

Under art. XVIII, § 6, county officers cannot appoint deputies and assistants unless authorized to do so by the commissioners. Taylor v. Canyon County, 6 Idaho 466, 56 P. 168 (1899), on appeal after remand, 7 Idaho 171, 61 P. 521 (1900); Campbell v. Board of Commissioners, 5 Idaho 53, 46 P. 1022 (1896). The commissioners may limit an authorization by only allowing appointment of a part-time assistant. Dygert v. Board of County Commissioners, 64 Idaho 160, 129 P.2d 660 (1942). However, commissioners have been ordered to authorize an appointment upon a district court's finding that the business of an office required a deputy. Dukes v. Board of County Commissioners, 17 Idaho 736, 107 P. 491 (1910). Thus, the power to authorize appointments does not give the commissioners an effective indirect means of controlling other offices.

Because the commissioners authorize all appointments, but cannot withhold such authorization when deputies and assistants

are needed, some means by which the commissioners can assess the manpower needs of each county office is required. A countywide personnel system to make such assessments might therefore be both permitted and desirable.

County commissioners set the salaries of all county officers, deputies, and assistants. Idaho Const. art. XVIII, §§ 6, 7; Idaho Code §§ 31-3106--3107. Etter v. Board of County Commissioners, 44 Idaho 192, 255 P. 1095 (1927); Criddle v. Board of Commissioners, 42 Idaho 811, 248 P. 465 (1926). However, the commissioners cannot cut salaries in order to assert authority over other offices. Planting v. Board of County Commissioners, 95 Idaho 484, 511 P.2d 301 (1973). Thus, like the power to authorize appointments, the power to set salaries does not provide the commissioners with a roundabout method of controlling deputies and assistants of other offices.

Because the commissioners must set salaries but cannot set them arbitrarily or for improper motives, a system of pay scales could well be a permissible component of a countywide personnel system.

Another permissible component of a countywide personnel system may be regulation of working hours. Under the Fair Labor Standards Act, employees are entitled to overtime pay if they work more than a certain number of hours in a given period. 29 U.S.C. § 207. Under Garcia v. San Antonio Metropolitan Transit System, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the FLSA applies to employees of local governments. The commissioners' right to set salaries may, in light of the FLSA, empower the commissioners to set work schedules as well, at least to the extent of setting the maximum number of hours each employee can work in a given period of time. See also, Dygert v. Board of County Commissioners, 64 Idaho 160, 129 P.2d 660 (1942).

A personnel system could also be established on an advisory basis. The 1979 guideline on this subject concluded:

[N]othing would appear to prevent the county commissioners from establishing guidelines and generalized procedures for personnel on a countywide basis to be used by the commissioners and other county officers to aid them in administering their various duties and offices, so long as the ordinance does not attempt to dictate such matters to the elective county officers, but leaves control of the offices and

personnel of the various county offices within the hands of elective county offices.

1979 Attorney General's Opinions at 251.

In 1983, the Idaho Supreme Court tacitly agreed. In Holloway v. Palmer, 105 Idaho 220, 668 P.2d 96 (1983), the court reversed a decision of the County Sheriff's Deputies Merit System Commission (since disbanded) in terminating a deputy. However, neither the majority nor the dissenters questioned the Commission's authority, even though the Commission was created by county ordinance and one of the five Commission members was appointed by the county commissioners. The sheriff participated in the system, appointing two of the Commission members. Thus, the court appears to have recognized that county officers may voluntarily bring their deputies and assistants within a comprehensive personnel system established by the commissioners.

II.

CREATION OF NEW COUNTY OFFICES

Article XVIII, § 6, of the Idaho Constitution lists the various county offices and states: "No other county offices shall be established. . . ." This language was invoked in the case of Meller v. Board of Commissioners, 4 Idaho 44, 35 P. 712 (1894). In Meller, the board of commissioners for Logan County hired an attorney for a fixed term whose duties included prosecution and proceedings before grand juries. The court held that the position was an "office," and thus its creation was forbidden by art. XVIII, § 6. The court so held despite the language in that section permitting commissioners to "employ counsel when necessary." The latter clause was said not to allow creation of a permanent office.

Thus, it is clear that the county commissioners may not create new offices. Less clear is whether a particular position created by the commissioners is an "office" as that term is used in art. XVIII, § 6. The problem is to distinguish between "officers" and "employees."

McQuillin lists three distinguishing characteristics of an officer: "(1) An authority conferred by law, (2) the power to exercise some portion of the sovereign functions of government, and (3) permanency and continuity." McQuillin Mun. Corp. § 12.30. That section also states:

The officer is further distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position.

These statements indicate that the distinction is a matter of degree. Whether a particular position is an "office" could only be decided by court action. Three Idaho cases have discussed this issue, primarily relying on conclusory statements from other jurisdictions as to each particular position's status. They are Meller v. Board of Commissioners, 4 Idaho 44, 35 P. 712 (1894) (county attorney is an officer); Hertle v. Ball, 9 Idaho 193, 72 P. 953 (1903) (irrigation district directors are officers); In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916) (irrigation district treasurer is an officer). On the other hand, a manager of a private irrigation company, who was paid through company funds and who took no oath of office, was held not to be an officer even though his post was established by statute. Carter v. Niday, 46 Idaho 505, 269 P. 91 (1928).

In summary, the county commissioners clearly cannot create new offices. However, every position created by the commissioners is not an office. Whether a position is an office must be decided on a case by case basis.

III.

HIRING OF EMPLOYEES BY COUNTY COMMISSIONERS

Article XVIII, § 6, does not expressly authorize the county commissioners to employ deputies or assistants. The Idaho Supreme Court has nonetheless concluded that such a power must be implied from the nature of commission functions. For example, the court has recognized the right of commissioners to hire an accountant to perform a statutorily authorized audit of county funds. Prothero v. Board of County Commissioners, 22 Idaho 598, 127 P. 175 (1912). The power to hire the accountant was said to be implied in the power of the commission to perform audits. The court quoted with approval Harris v. Gibbins, 114 Cal. 418, 46 P. 292 (1896):

Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted.

22 Idaho at 602, 127 P. at 177. The commissioners need not make a specific finding that an assistant is needed prior to hiring. Instead, under Prothero, the fact that an assistant is hired creates a presumption that the commissioners found an assistant necessary.

The implied powers approach of Prothero is now codified in Idaho Code § 31-828. That section gives county commissioners the power "[t]o do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

The Idaho Code lists other powers of county commissioners that would require them to employ assistants. Idaho Code § 31-809, a predecessor of which was applied in Prothero, authorizes audits. Idaho Code § 31-805 authorizes laying out and maintaining roads. Idaho Code § 31-806 authorizes provision of a poor farm. Idaho Code § 31-822 authorizes maintenance of fair grounds. These are examples of powers of county commissioners that clearly could not be personally carried out by them.

The implied power to hire employees could allow county commissioners to hire personnel managers. Art. XVIII, § 6, requires the commissioners to set salaries and authorize appointments for deputies and assistants of other officers. It is possible that a county could have so many deputies and assistants in various offices that the commissioners could not intelligently set salaries and determine manpower needs by themselves. In such a county, Prothero would allow the commissioners to hire the needed personnel managers.

SUMMARY:

County commissioners have power to authorize appointment of deputies and employees for other county offices, to set salaries for these deputies and employees, and to insure that their work

schedules are in compliance with the Fair Labor Standards Act. To the extent the commissioners determine that a countywide personnel system is the most efficient and professional way to carry out these responsibilities, commissioners would have power to create such a system and to hire employees to staff it. The commissioners could not, however, use such a system to control the other county officers or to judge their job performance.

AUTHORITIES CONSIDERED

Federal Cases

Garcia v. San Antonio Metropolitan Transit System, 469 U.S. ___, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)

Federal Statutes

29 U.S.C. § 207

Idaho Constitution

Article XVIII, § 6
Article XVIII, § 7

Idaho Cases

In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916)

Campbell v. Board of Commissioners, 5 Idaho 53, 46 P. 1022 (1896)

Carter v. Niday, 46 Idaho 505, 269 P. 91 (1928)

Clark v. Ada County Board of Commissioners, 98 Idaho 749, 572 P.2d 501 (1977)

Criddle v. Board of Commissioners, 42 Idaho 811, 248 P. 465 (1926)

Dukes v. Board of County Commissioners, 17 Idaho 736, 107 P. 491 (1910)

Dygert v. Board of County Commissioners, 64 Idaho 160, 129 P.2d 660 (1942)

Etter v. Board of County Commissioners, 44 Idaho 192, 255 P. 1095 (1927)

Gorman v. Board of Commissioners, 1 Idaho 553 (1874)

Hertle v. Ball, 9 Idaho 193, 72 P. 953 (1903)

Holloway v. Palmer, 105 Idaho 220, 668 P.2d 96 (1983)

Meller v. Board of Commissioners, 4 Idaho 44, 35 P. 712 (1894)

Planting v. Board of County Commissioners, 95 Idaho 484, 511 P.2d 301 (1973)

Prothero v. Board of County Commissioners, 22 Idaho 598, 127 P. 175 (1912)

Taylor v. Canyon County, 6 Idaho 466, 56 P. 168 (1899), on appeal after remand, 7 Idaho 171, 61 P. 521 (1900)

Idaho Statutes

Idaho Code § 31-805

Idaho Code § 31-806

Idaho Code § 31-809

Idaho Code § 31-822

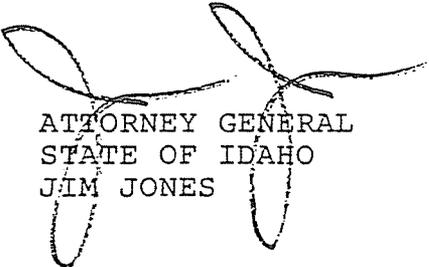
Idaho Code § 31-828

Idaho Code § 31-1601 to 1613

Other

McQuillin on Municipal Corporations § 12.30

DATED this 21st day of August, 1986.


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